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IN THE

Supreme Court of the United States

OCTOBER TERM, 1968

No. 422

MARY TOWNSEND COCHRAN,
Petitioner,

v.

GEORGE L. MORRIS AND GIRARD TRUST BANK, EXECUTORS UNDER WILL, AND TRUSTEES UNDER DEED, OF MARY H. TOWNSEND, DECEASED; BRYN MAWR HOSPITAL; THE CHILDREN'S HOSPITAL OF PHILADELPHIA; FATHER FLANAGAN'S BOYS' HOME; BISHOP LEONARD'S CHARITIES, INC.; AMERICAN CANCER SOCIETY, PHILADELPHIA DIVISION, INC.; ESTATE OF JOSEPH F. MAGUIRE, DECEASED; RT. REV. MSGR. ALOYSIUS F. X. FARRELL; LILLIAN R. KELLY; EDWARD C. DURKIN, M.D.; ELIZABETH T. STOEBENAU; MOST REV. JOHN J. KROL, ARCHBISHOP OF PHILADELPHIA; ST. VINCENT'S HOSPITAL FOR WOMEN AND CHILDREN; WILLIAM C. SENNETT, ATTORNEY GENERAL OF COMMONWEALTH OF PENNSYLVANIA AS PARENS PARTIAE OF SUNDRY CHARITABLE BENEFICIARIES,

Respondents.

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. ITEMS DISCUSSED.

Petitioner has endeavored to limit her reply to those arguments and argumentative facts in Respondents' Brief in Opposition to Petition for Certiorari which were not only incorrect but were not covered or anticipated in her

Petition and which were believed sufficiently important possibly to affect the outcome in these proceedings. Petitioner therefore now addresses herself only to the following passages which appear in the above Opposition Brief:

(1) In The Statement of the Case appearing under the sub-heading "(c) The Trial" on page 5 thereof the following "facts" are stated:

> "Her counsel was allowed to (and did) call and examine any witnesses he wished and the documents previously demanded for pre-trial discovery were by stipulation present in court as if on subpoena duces tecum (record 433a et seq.) and available for production to the extent that Petitioner might have properly identified them and showed their relevance in accordance with Pennsylvania practice. In the one case where such a document was so identified (the attorney-draftsman's office memorandum concerning one of the contested instruments), it was produced (record 543a-547a)."

(2) Under the caption "III. Argument" on page 7 of the same Brief the second and fourth sentences respectively read as follows:

> "Petitioner is merely complaining of the administration by a state court of its own rules which grant certain rights of discovery in specific situations subject to prescribed limitations."
>
> * * * *
>
> "Petitioner never showed or even sought to show that the areas of inquiry deemed irrelevant by the state courts (depositions of relevant witnesses and access to relevant documents) had any significance whatever." (Parenthetical remark ours.).

II. DISCUSSION.

A. Offers of Proof.

If we spell it out, the Respondents erroneously contend in the first and last quotations above that if Petitioner had

made a proper offer of proof showing specifically that any or all of the suppressed documents (correspondence, memoranda, cancelled checks, tentative drafts, etc.) were relevant to an issue associated with any of the twelve disputed writings of a testamentary nature allegedly executed by the decedent, then the Trial Court would, of course, have made said documents available to Petitioner and would have admitted them in evidence. As proof of this contention Respondents point to the release during trial of a memorandum from the attorney-draftsman's files (which was introduced by Petitioner as part of Exhibit DDD).[1]

Keeping in mind that all details concerning the number, dates and contents of the ultimately suppressed documents prior to and during trial were in the exclusive possession and knowledge of the Respondents because of adverse rulings by the Trial Court, there is demonstrated a leave taking from the practicalities of the trial of cases when one seriously attempts to maintain, as Respondents do, that Petitioner would have been given access by the Trial Court to each and every one of said documents merely upon demonstrating the relevance thereof. Obviously one cannot make such an offer of proof without first seeing the documents involved or otherwise acquiring some knowledge concerning them. And if such an offer of proof could not possibly have been made, then logically it must be admitted that the documents in question were effectively suppressed.

The citation by Respondents of the office memorandum of the attorney-draftsman (part of Exhibit DDD, Record 2286a-2289a) as a concrete illustration of their offer of

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[1] Since there necessarily was suppression of relevant documents and hence no real day in court even under the Respondents' theory, it matters little that Respondents' contention conflicts with Petitioner's understanding that the Trial Court would not have released the documents ultimately suppressed for *any* reason so long as Respondents continued to oppose such release (Cf. Trial Court Opinion dated 3/29/67, Appendix to Petition for Certiorari, second sentence on page 28.)

proof contention is particularly inappropriate. Mr. Bishop (the attorney-draftsman) attempted under cross-examination during trial among other things to explain just when certain changes which appeared in the last of decedent's alleged testamentary documents took place in light, inter alia, of the spread between the dates of typing as shown by the typing symbols and the date of alleged execution. In support of his version Mr. Bishop produced the following:

(1) A typed Memorandum dated May 4, 1965;

(2) A typed memo for Mr. Bishop of a telephone message from Mr. Morris to Mr. Bishop's office dated May 18, 1965 containing instructions for Mrs. Townsend's instruments; and

(3) A note in Mr. Bishop's hand also dated May 18, 1965 of Mr. Bishop's return call on the same date to Mr. Morris.

These three memos theretofore suppressed by the trial court were promptly offered by Petitioner's counsel as her Exhibit DDD when he noted:

(a) How very fortuitously the memo dated May 4, 1965 (as to which Mr. Bishop could not give the typing date—Record 548a) supported Mr. Bishop's answers to a number of relatively minor points raised after Mrs. Townsend's death;

(b) That the telephone memos were not entirely consistent with:

(1) Either Mr. Morris' and Mr. Bishop's denial elsewhere of any inference that the ideas for what went into Mrs. Townsend's disputed testamentary documents may have originated with Mr. Morris rather than Mrs. Townsend (Record 1462a; 1825a-1826a);

(2) Or the fact that Mr. Morris is reported in the handwritten note to have said that Msgr. Far-

> rell was No. 1 choice with Mrs. Townsend and yet Mr. Morris instructed Mr. Bishop to give only $500,000. to the Monsignor although the four less favored (?) residuary charities would under the instruments as finally drawn receive one-quarter of the residuary estate, or about $1,000,000. each. (Cf. Appendix II to Pet. for Cert. second last column.)

Thus Exhibit DDD became available when Mr. Bishop produced said memos during trial for a purpose of his own and not because of anything done by Petitioner's counsel to obtain them for that purpose for which Petitioner's counsel introduced them.[2]

B. Administration of Pennsylvania Rules.

The second quotation above from the Brief in Opposition does not pretend that the suppression of relevant and material evidence was merely an erroneous application in this case by the Pennsylvania Courts of otherwise fair rules, but rather implied that the result complained of was merely a natural and usual result of the normal application by the Pennsylvania Courts of rules duly and properly instituted. In view of the radical and precipitous change in the general discovery practice of the Trial Court—from a system almost as liberal and broad as that provided for by the Federal Rules of Civil Procedure to one which denied litigants all discovery except such as was specifically allowed on petition and order in each case (which switch was instituted by the Trial Court on the eve (March 4, 1966) of the Trial Court's filing of a discovery opinion

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[2] Respondents' Brief refers to Record 543a-547a in connection with its contentions relating to Exhibit DDD. But a continued examination of the Record from 548a-574a (wherein Petitioner's counsel attempted, inter alia, to get Mr. Bishop to explain the above inconsistencies in Exhibit DDD) will convey some notion of the typical interference from the Trial Court which Petitioner's counsel usually experienced whenever one of the witnesses hostile to Petitioner seemed to be getting into deep water.

(dated March 7, 1966, record 183a et seq.) against Petitioner which would have been inconsistent with prior practice)—Petitioner vehemently insists that the Trial Court's new general discovery rule #36.1 was not properly instituted as to her, in addition to being otherwise deficient generally for reasons discussed below.

Changing ground rules that would or could affect the outcome in the middle of ball games has always violated American concepts of fair play whether or not the umpire is subjectively sincere in his belief that continued play under the starting rules would be unfair to one of the teams, particularly if that team is the home team. And in this case, Petitioner, a resident of Chevy Chase, Maryland, is still without any real explanation from the Pennsylvania Courts why, for example, she should be barred under the new rule (but not under the old) from seeing the cancelled checks on a five to six figure checking account in the Girard Trust Bank, supposedly subject only to decedent's personal signature, especially when:

(1) forgery is the principal issue;

(2) the last admittedly genuine specimen of decedent's signature was executed about six months to two and a half years prior to the dates of the various disputed testamentary writing; (Cf. Pet. for Cert. Appendix page 51, panel 1 for dates of oral specimen signatures admitted genuine; See Appendix II, Column heading for dates of testamentary writings.)

(3) the Girard Trust Bank is also involved in its capacity as Executor and Trustee of decedent's disputed Will and Trust.

But passing this, Petitioner would agree that the results in this case could normally and naturally be expected to occur in other will contests tried in any county of Pennsylvania which has a local discovery rule similar to the Trial Court's new discovery rule because it places in the Trial

Judge the power consciously or unconsciously to affect the outcome of the contest by his practically uncontrolled (as would appear from the Pennsylvania Supreme Court Opinion in this case) discretion in granting or withholding access to relevant and material evidence. However this a further reason *for* rather than *against* granting relief here since the potential denial of due process inherent in such a rule is general and not limited.

III. CONCLUSION

Petitioner respectfully urges that the positions taken in this case by the Respondent Charities and others in the Brief in Opposition, when viewed in the foregoing light, become tantamount to an admission of Petitioner's claim that relevant and material evidence was suppressed, from which a denial of due process necessarily follows. Petitioner, therefore, respectfully repeats her request that a Writ of Certiorari issue in this case.

In the alternative, if the denial of due process in this case is deemed so manifest that argument is considered neither necessary nor desirable, then this Honorable Court is respectfully urged to consider ordering a new trial at this juncture and (in view of Petitioner's prior experience with mid-case changes of local discovery rules) further ordering that said new trial be held after Petitioner has had a reasonable opportunity to reach all relevant and material facts under discovery rules which are both familiar and not subject to change introduced because of this case.

A system of discovery meeting these criteria presently exists in the discovery procedures applicable to civil cases in the United States District Court for the Eastern District of Pennsylvania and the application of its discovery practice would be doubly appropriate here. First, said discovery practice is quite similar to the practice which existed in the Orphans' Court of Montgomery County prior to the above-mentioned change therein. Second, all coun-

sel in this case are active members of one or more bars of a Pennsylvania court located within the territorial jurisdiction of the United States District Court for the Eastern District of Pennsylvania and therefore are presumably members of the bar of the latter court and hence familiar with its rules.

Respectfully submitted,

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